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'Aggravated Violations', Roma Housing Rights, and Forced Expulsions in Italy: Recent Developments under the European Social Charter Collective Complaints System

*By Aoife Nolan**

The recent decision of *COHRE v Italy*¹ constitutes a key step in the evolution of the collective complaints jurisprudence of the European Committee Social Rights.² In addition to being a substantial addition to that body's existing jurisprudence on housing rights³ and Roma rights,⁴ it contains a number of new elements with major implications for human rights protection under the European Social Charter 1961⁵ and the Revised European Social Charter 1996 (Revised Charter).⁶ These relate to both process and standards: the complaint marks the European Committee of Social Rights' ('the Committee') first use of its expedited process for addressing complaints, as well as its initial engagement with the development of the concept of an 'aggravated violation', the issue of 'retrogressive steps' and the expulsion of migrants.

This note opens with an introduction to the complaint, followed by a discussion of the approach adopted towards its admissibility by the Committee. The next section focuses on the decision on the merits where, following an overview of the Committee's findings, I analyse key innovative elements of the decision. Having considered the implications of the decision in terms of the Committee's reference to and reliance upon international and regional human rights law standards, I turn to the question of future developments. In doing so, I focus particularly on the issue of implementation of the Committee's findings.

1. The Complaint: An Introduction

The security of Roma and Sinti in Italy has been significantly eroded since 2006. In November of that year so-called 'Pacts for Security' were adopted by state and local authorities in relation to a wide range of cities. Nineteen months later, these pacts were given legal status. All of the Pacts followed the model of delegating increased authority to the Prefect with a view to implementing a strategic plan to solve what the Pacts referred to as

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¹ Complaint No. 58/2009, *Centre on Housing Rights & Evictions (COHRE) v Italy*, 6 July 2010. For an analysis of this decision authored by the lead lawyer on the case, see B. Thiele, '*Centre on Housing Rights and Evictions (COHRE) v. Italy: Accountability for Violations of Housing Rights and Mass Expulsion of Roma and Sinti Communities in Italy*' (2010) 7(4) *Housing & ESC Rights Law Quarterly* 1 (forthcoming).

² For a useful overview of the European Social Charter, the Revised European Social Charter and the functioning of the collective complaints system, see Khaliq and Churchill, 'The European Committee of Social rights' in Langford (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: CUP, 2008) 428. For an 'insider view', see O'Conneide, 'Social Rights and the European Social Charter – New Challenges and Fresh Opportunities' in De Schutter (ed.) *The European Social Charter : a Social Constitution for Europe* (Louvain: UCL, 2010), Chapter 7.

³ See, e.g., Complaint No. 52/2008, *COHRE v Croatia*, 7 July 2010; Complaint No. 49/2008, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Greece*, 25 January 2010; Complaint No. 39/2006, *European Federation of National Organisations Working with the Homeless (FEANTSA) v France*, 4 February 2008; Complaint No. 31/2005, *ERRC v Bulgaria*, 30 November 2006; Complaint No. 27/2004, *ERRC v Italy*, 2 December 2005; Complaint no. 53/2008, *FEANTSA v Slovenia*, 29 September 2009; Complaint No. 15/2003, *ERRC v Greece*, 7 February 2005.

⁴ See, e.g., *INTERIGHTS v Greece*, *ibid.*; *ERRC v Bulgaria*, *ibid.*; *FEANTSA v Slovenia*, *ibid.*; *ERRC v Greece*, *ibid.*; Complaint No. 48/2008, *European Roma Rights Centre (ERRC) v Bulgaria*, 31 March 2009.

⁵ ETS 035.

⁶ ETS 163

either the ‘nomad emergency’ or the ‘Roma emergency’. Measures authorised by them included state monitoring of camps, collection of data and the identification and census of camp inhabitants. The Pacts also permitted the closure of ‘abusive’ settlements and evictions of camp inhabitants, as well as the construction of effectively segregated settlements for Roma and Sinti. These measures resulted in numerous instances of forced eviction, where no alternative or adequate alternative accommodation was offered. Furthermore, in 2008, following the formation of a new national government, the mass expulsion of non-Italian Roma and Sinti who were citizens of other EU countries increased dramatically.⁷ The period of 2006-2010 also witnessed a marked deterioration in the (already frequently substandard) living conditions of Roma and Sinti.

In its complaint, COHRE alleged that the situation of Roma and Sinti in Italy amounted to violations of Articles 16,⁸ 19(1), 19(4)(c), 19(8),⁹ 30,¹⁰ 31(1), 31(2) and 31(3)¹¹ of the Revised Charter, as well as violations of Article E¹² taken in conjunction with each of these provisions.¹³ COHRE requested the Committee to make four key findings. First, that the adoption of the ‘Pacts for Security’ and so-called ‘Nomad’ state of emergency Decrees and their implementing Orders and Guidelines constituted deliberate retrogressive steps which failed to address the violations found by the Committee in the earlier Complaint of *ERRC v*

⁷ COHRE, ‘European body slams Italy’s treatment of Roma’, Press Release, 3 Nov. 2010, <http://www.cohre.org/news/press-releases/european-body-slams-italy-s-treatment-of-roma> (accessed 18 Nov. 2010)

⁸ Article 16: ‘With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means’.

⁹ Article 19: ‘With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake:

1. to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;

4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:

- a. remuneration and other employment and working conditions;
 - b. membership of trade unions and enjoyment of the benefits of collective bargaining;
 - c. accommodation;

8. to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;’

¹⁰ Article 30: ‘With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

- a. to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;

- b. to review these measures with a view to their adaptation if necessary.’

¹¹ Article 31: ‘With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.’

¹² Article E: ‘A differential treatment based on an objective and reasonable justification shall not be deemed discriminatory’.

¹³ *COHRE v Italy*, *supra* note 1, para 10.

*Italy*¹⁴ involving Roma housing rights in Italy, and in subsequent conclusions relating to the right to housing of Roma and Sinti in Italy. Second, COHRE asserted that both the *de facto* and *de jure* segregation regarding the housing of Roma and Sinti, as well as the obstacles faced by Roma and Sinti in gaining or retaining legal status, worsened their living conditions. This conflicted with the Revised Charter's requirement that states adopt a coordinated approach to combat poverty and social exclusion. COHRE also argued that the policy and practice of segregating Roma and Sinti families in 'ghettos', by using discriminatory identification procedures, denied them access to adequate housing and protection of family life. Finally, it was claimed that the reference to 'nomads' as a threat to national security had contributed to the racist and xenophobic propaganda relating to emigration and immigration of Roma and Sinti. According to the complainant, this resulted in Roma and Sinti migrants being deprived of protection and assistance particularly as regards access to housing and in cases of forced evictions from their housing or expulsions from Italian territory.¹⁵

Notably, while the Committee generally deals with complaints in the order in which they are ready for examination, this was the first occasion that it chose to give priority to the examination of a particular complaint, as provided for in its rules.¹⁶ The Committee's decision to do so reflects its perception of the urgency and seriousness of the issues raised in the complaint.¹⁷ It also highlights the ability of the Committee to structure its workload so as to accord priority to more egregious allegations of Charter violations and to ensure that they are dealt with in a timely fashion. Indeed, given that the complaint was registered on 29 May 2009, that the Committee gave its decision on the merits on 6 July 2010, and that the Committee of Ministers adopted a resolution on the matter on 21 October 2010, this constitutes a remarkably short 'turnaround time' in terms of a regional or international complaints mechanism.¹⁸

2. COHRE v Italy = 'ERRC v Italy Plus'?

In an earlier case, the Committee had the opportunity to address the issue of Roma housing rights in Italy. In *European Roma Rights Centre (ERRC) v Italy*,¹⁹ the complainant NGO alleged that Roma in Italy were being denied an effective right to housing in violation of Article 31 of the Revised Charter. The ERRC also claimed that segregationist policies and practices in the housing field constituted racial discrimination contrary to Article 31 read alone or in conjunction with Article E of the RESC.

In brief, in its decision on the merits in that case, the Committee considered that the complaint raised three specific issues. First, it found that the insufficiency and inadequacy of camping sites for itinerant Roma constituted a violation of Article 31(1) taken with Article E

¹⁴Supra note 3.

¹⁵ *COHRE v Italy*, supra note 1, para. 11.

¹⁶ See Rule 26 of 'Rules adopted during the 201st session on 29 March 2004 and revised during the 207th session on 12 May 2005 and during the 234th session on 20 February 2009': http://www.coe.int/t/dghl/monitoring/socialcharter/ESCRrules/ESCRRules_en.asp

¹⁷ The Committee stated that 'in its decision on admissibility of 8 December 2009 the Committee considered that the allegations of COHRE were serious. It thus decided to give priority to the examination of the present complaint in accordance with Rule 26 *in fine* of its Rules'. (*COHRE v Italy*, supra n1, Para 23).

¹⁸ The average time for the resolution of a collective communication can vary greatly, depending on factors such as the speed of response of parties, the complexity of the case and the divergent views of Committee members. However, the Italian decision was completed in less than 6 months - including an oral hearing which is not standard practice. Other complaints can take up to a year to resolve, depending on the circumstances.

¹⁹ Supra note 3.

of the Revised Charter. Second, the systematic forced evictions of Roma from sites/dwellings unlawfully occupied by them constituted a violation of Article 31(2) taken together with Article E. Finally, the Committee held that the lack of permanent dwellings of an acceptable quality to meet the needs of Roma wishing to settle constituted a violation of Articles 31(1) and 31(3) taken together with Article E.

The Committee had already dealt with one ‘repeat complaint’ prior to *COHRE v Italy* - that of *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Greece*.²⁰ That complaint focused on largely identical facts to those addressed by the Committee in its earlier finding of a violation of the Charter in *ERRC v Greece*.²¹ Greece objected to the admissibility of the latter complaint on a number of grounds, including (a) that the substance of the complaint was in essence identical to that of the earlier complaint which was being followed up through the reporting procedure; and (b) that the short time between the decision on the merits in the earlier complaint and the later complaint, taking into account the similar subject matter, meant that the subsequent complaint amounted to an abuse of procedure.²²

In its admissibility decision, the Committee highlighted a number of points: ‘firstly ... the fact that the same provision of the Charter was the subject of a previous complaint does not in itself render another complaint inadmissible’.²³ The Committee also noted that the complaint ‘concerns alleged violations of the Charter that had taken place since [*ERRC v Greece*] or concerns alleged ongoing violations of the Charter’.²⁴ The Committee reiterated that it had previously held ‘that neither the fact that the Committee has already examined this situation in the framework of the reporting system, nor the fact that it will examine it again during subsequent cycles do not [*sic.*] in themselves imply the inadmissibility of a collective complaint concerning the same provision of the Charter and the same Contracting Party’.²⁵

Notably, in this instance, Italy did not raise any objections to the admissibility of COHRE’s complaint - a fact that would suggest that the Committee’s unambiguous statements in *INTERIGHTS v Greece* have resolved the ‘duplication question’ definitively. In its decision, the Committee expressly considered COHRE’s complaint in light of the earlier matter, stating:

The present complaint indeed not only alleges that Italian authorities have not ensured a proper follow-up to the decision on the merits... [*in ERRC v Italy*]..... It also, more specifically, raises new issues linked to the adoption by the Italian authorities of allegedly retrogressive measures that would have worsened the situation assessed by the Committee.²⁶

The collective complaints system is notable in terms of its admissibility criteria. Generally, most other international complaints processes – including most of those relating to the UN treaty complaints mechanisms,²⁷ and those of the European Convention on Human Rights,²⁸

²⁰ Supra note 3.

²¹ Supra note 3.

²² *INTERIGHTS v Greece*, Decision on Admissibility, 23 Sept. 2008, para 2.

²³ *Ibid.*, para 7.

²⁴ *Ibid.*

²⁵ *Ibid.*, citing Complaint No. 1/1998, *International Commission of Jurists v Portugal*, decision on admissibility, 10 March 1999, para 10.

²⁶ *COHRE v Italy*, para 24.

²⁷ See Article 3(2)(c), Optional Protocol to the International Convention on Economic, Social and Cultural Rights 1966, 993 UNTS3 (OP-ICESCR); Article 5(2)(a), First Optional Protocol to the International Covenant

the American Convention on Human Rights²⁹ and the African Charter on Human and Peoples' Rights³⁰ - will not deal with a matter that is being and/or has already been settled by another international human rights body. However, no such criterion is included in the 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

In practice, it is a major advantage in terms of ensuring the effective protection of Charter/Revised Charter rights that the Committee may address the same Charter-related issues in both its collective complaints and reporting process. This possibility enables the Committee to effectively monitor state response (or not) to its conclusions and to engage in a dialogue with states that not be possible if its role started and ended with the determination of a particular collective complaint on an issue. The interplay between the reporting and the collective complaints mechanism is demonstrated by the Committee's references to its conclusions on state reports when outlining Charter obligations in its collective complaints decisions.³¹

3. The Decision on the Merits

A. The Rights Violations

Prior to considering the allegations of violations of Charter and Revised Charter rights, the Committee addressed the Italian government's claim that many of the Roma and Sinti in Italy were third country nationals or persons without resident permits, not Italian citizens or nationals of other States Parties to the Charter/Revised Charter. The status of alleged rights-holders as nationals of states parties to the Charter/Revised Charter is significant given the existence of Paragraph 1 of the Appendix to the Revised European Social Charter. This provides that

[w]ithout prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19. This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties.

on Civil and Political Rights, 1966, 999 UNTS 302 (OP1-ICCPR); Article 4(2)(a), Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 1999, 2131 UNTS 83 (OP-CEDAW); Article 22(5)(a), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85; and Article 77(3)(a), International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families; Article 2(c), Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006.

²⁸ Article 35(2)(b) ECHR.

²⁹ Article 47(d) American Convention on Human Rights.

³⁰ While Article 56 African Charter on Human and Peoples' Rights does not explicitly include such a condition, the Commission appears to apply it. See, the African Commission on Human and Peoples' Rights' Information Sheet, No. 2, 'Guidelines on the Submission of Communications', p. 5: http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.2.doc (accessed 15 November 2010).

³¹ See, e.g., *ibid.*, paras 54 and 85.

In practice, the Committee has stated that this ‘restriction’ on rights is ‘to be read restrictively’³² and has asserted that not allowed the paragraph to operate to exclude Committee consideration of alleged violations of the Charter rights of undocumented migrants (particularly children). While the Committee has stated that States Parties may treat persons lawfully or unlawfully present on their territories differently, it has held that, ‘in so doing, human dignity, which is a recognised fundamental value at the core of positive European human rights law, must be respected’.³³

In *COHRE v Italy*, the Committee highlighted that, due to a lack of identification possibilities, distinguishing whom the protection of the Revised Charter and its Appendix applied without restriction was extremely complex.³⁴ It reiterated that Roma, as well as Sinti, are not a homogenous group; the vulnerable group covered by the complaint included Italian citizens, nationals of other parties to the Charter or Revised Charter, and - ‘in a proportion that is not clearly determined’ - third country nationals or people without residence permits. The Committee made it clear, however, that this should not be result in persons fully protected by the Charter being denied of their rights under it.³⁵ Indeed, given the Committee’s previous findings on the strong linkage between housing and the right to life and human dignity,³⁶ it is arguable that violations of the relevant provisions would have been found anyway.³⁷

The Committee decided to address COHRE’s allegations in terms of: (i) Article E taken in conjunction with Article 31; (ii) Article E taken in conjunction with Article 30; (iii) Article E taken in conjunction with Article 16; and (iv) Article E taken in conjunction with Article 19.

In brief, with regard to the first allegation, the Committee found that the substandard living conditions of Roma and Sinti in camps and other similar settlements in Italy constituted a violation of Article E together with Article 31(1) (the duty to take measures designed to promote access to housing of an adequate standard).³⁸ In doing so, the Committee noted that a worsening in living conditions had followed the adoption of the ‘security measures’, which were directly targeted at a vulnerable group and did not take ‘due and positive account of the differences of the population concerned’.³⁹ Furthermore, the practice of eviction of Roma and Sinti without respecting the dignity of the persons involved, and without alternative accommodation being made available, as well as the violent acts accompanying such evictions, constituted a violation of Article E with Article 31(2) (the duty to take measures designed to prevent and reduce homelessness with a view to its gradual elimination).⁴⁰ The Committee also determined that the failure of the Italian government to ensure access to housing for Roma and Sinti, and their resultant segregation in camps violated Article E with Article 31(3) of the Revised Charter (the duty to take measures designed to make the price of housing accessible to those without adequate resources).

³² See, e.g., Complaint No. 14/2003, *International Federation of Human Rights Leagues (FIDH) v France* 3 November 2004; *Complaint No.47/2008; Defence for Children International (DCI) v Netherlands*, 27 October 2009, para 36.

³³ *DCI v the Netherlands*, *ibid.*, para. 73.

³⁴ *COHRE v Italy*, *supra* note 1, para.33.

³⁵ *Ibid.*

³⁶ See, e.g., *DCI v the Netherlands*, paras 47 and 62.

³⁷ See, *COHRE v Italy*, *supra* note 1, para 33.

³⁸ *Ibid.*, para. 59.

³⁹ *Ibid.*, para. 58.

⁴⁰ *Ibid.*, para. 79.

In finding a violation of the right to protection against poverty and social exclusion (Article 30) and Article E, the Committee stated – as it had done in *ERRC v Italy* – that Italy had failed to adopt an overall and coordinated approach to promoting effective access to housing for persons who live or risk living in a situation of social exclusion. In doing so, the Committee strongly emphasised the link between the segregation and poverty situation experienced by Roma and Sinti in Italy with a civil marginalisation due to the failure of the authorities’ to address those persons’ lack of identification documents.⁴¹ I will return to this point below.

When dealing with the alleged racial discrimination in the enjoyment by Roma and Sinti families to social, legal and economic protection (Article E taken together with Article 16), the committee considered that the parties’ submissions related to two different aspects of Article 16. First, the right of the family to adequate housing and, second, the right of the family to protection against undue interference in family life. The Committee disposed of the former issue swiftly, simply stating that ‘a finding of Article E taken in conjunction with Article 31 amounts to a finding of Article E in conjunction with Article 16 in this respect’.⁴² It thus reiterated its finding in an earlier decision of a significant overlap between Article 16 and 31.⁴³ With regard to the latter right, the Committee focussed on state interventions directed towards the monitoring of Sinti and Roma camps. These interventions included the fingerprinting of inhabitants, the compilation and storage of photometric and other personal information in databases, and the requirement in some cases for a specific identity card to enter a camp. The Committee concluded that the various measures of identification concerning Roma and Sinti were exclusively based on a theoretical security reason, rather than being directed towards enlightening any social problem⁴⁴ or the formulation of rational policy to address discrimination against a particular group.⁴⁵ The Committee held that Italy had not established that the contested “security measures” respect the principle of proportionality and are necessary in a democratic society’.⁴⁶ Furthermore, the conditions in which the operations were carried out meant that there was no protection against arbitrariness.⁴⁷ This resulted in a violation of Article E taken with Article 16.

In relation to the final issue, the Committee found that the use of xenophobic political rhetoric or discourse against Roma and Sinti constituted a violation of Article E taken with Article 19(1). In doing so, the Committee considered that the state had not met the requirement of taking ‘all appropriate steps against misleading propaganda by means of legal and practical measures to tackle racism and xenophobia affecting Roman and Sinti’.⁴⁸ Building on its determination of a violation of the right to housing Roma and Sinti under Articles E and 31, the Committee stated that its findings in that regard also applied to Roma and Sinti *migrants* and their families residing legally in Italy.⁴⁹ Finally, the Committee also found that the situation of expulsion of Roma and Sinti constituted a violation of Article E taken with Article 19(8) of the Revised Charter. I will return to this latter issue below in my analysis of specific, innovative elements of the Committee’s decision.

⁴¹ Ibid., para. 103.

⁴² Ibid., para. 116.

⁴³ *ERRC v Bulgaria*, supra note 6, para. 17.

⁴⁴ *COHRE v Italy*, supra note 3, para. 130.

⁴⁵ Ibid., para. 117.

⁴⁶ Ibid., para 127.

⁴⁷ Ibid., para. 131.

⁴⁸ Ibid., para.139.

⁴⁹ Ibid., para. 146.

Following on from this summary of the Committee's key findings, the remainder of this section will be devoted to three significant innovative elements of the Committee's decision.

B. Racial Discrimination and 'aggravated violations'

In its introductory statements on discrimination,⁵⁰ the Committee explicitly referred to the statement from the European Court of Human Rights that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.⁵¹ Following on from this, later in its decision, the Committee outlined the concept of an 'aggravated violation'. Such a violation is constituted when two criteria are met: 'on the one hand, measures violating human rights specifically targeting and affecting vulnerable groups are taken; on the other, public authorities not only are passive and do not take appropriate action against the perpetrators of these violations, but they also contribute to this violence'.⁵² In delineating a notion of 'aggravated responsibility' for the authorities in situations in which perpetrators of generalised violence against Roma are officials, the Committee specifically referred to the 'aggravated responsibility' jurisprudence of the Inter-American Court of Human Rights – a body whose case-law it had never cited prior to this decision.⁵³ In terms of the Inter-American Court's jurisprudence, specific human rights violating acts may result in 'aggravated international responsibility of the respondent State' due to, amongst other things, the specific context in which the acts occurred,⁵⁴ the nature of victims (for instance, where the victims are children)⁵⁵ and where there is non-compliance with the protection and investigation duties set out under the American Convention.⁵⁶ The Committee highlighted that such aggravated violations not only affect individuals as victims or the relationship between these individuals and the respondent state, 'they [also] challenge the community interest and the fundamental common standards shared by Council of Europe Member States (human rights, democracy and the rule of law). Consequently, the situation requires urgent attention from all Council of Europe Member States'.⁵⁷

The Committee found that the way in which evictions were carried out, including the perpetration of criminal actions against Roma and Sinti settlements by both officials and non-officials (with the not-so-tacit approval of the authorities), as well as the active stigmatisation of Roma and Sinti constituted an aggravated violation of Article 31(2) with Article E. In making this determination, the Committee also took into consideration its earlier decision in *ERRC v Italy* and the fact that the situation had worsened since that finding. In its subsequent consideration of the violation of Article 19(1) together with Article E, the Committee held

⁵⁰ Ibid., paras 34-48.

⁵¹ Ibid., para. 37, citing *Timeshev v Russia*, Russia 44 EHRR 776, paras 56 and 58.

⁵² Ibid., para. 76.

⁵³ Ibid., para. 75 citing the Inter-American Court of Human Rights in *Myrna Mack Chang v. Guatemala*, Series C No. 101, para 139; *Las Masacres de Ituango v. Colombia*, IACtHR Series C 148, para 246; *Goiburú and others v. Paraguay*, IACtHR Series C 153, paras 86-94; or *La Cantuta v. Peru*, IACtHR Series C no 162, paras 115-116. The Committee had, however, referred to the 'principles' of the Court's jurisprudence in an earlier decision, see Complaint No. 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, decision of 6 December 2006, para 196..

⁵⁴ See, e.g., *La Cantuta v. Peru*, *ibid*,

⁵⁵ See, e.g., *Las Masacres de Ituango v. Colombia*, supra n58, para 246.

⁵⁶ See, e.g., *Goiburú and others v. Paraguay*, supra n58, para 90..

⁵⁷ Ibid., para. 78.

that the racist misleading propaganda against migrant Roma and Sinti indirectly allowed or directly emanating from the Italian authorities also constituted an aggravated violation.⁵⁸

The Committee's establishment of the doctrine of 'aggravated violation' sends a clear message of 'zero tolerance' in relation to (a) state commission of, (b) state failure to address, and (c) state collusion in, discrimination and violence suffered by vulnerable groups. Given the strong evidence from a range of jurisdictions of state participation in, or tolerance of, discrimination against Roma and Sinti, the scope for future employment of the aggravated violation by the Committee seems highly probable.

C. Protection of migrants and forced expulsions

In its decision, the Committee addressed the issue of the expulsion of Roma and Sinti from Italy in strong terms. While acknowledging that Article 19(8) permits exceptions to the rule against non-expulsion, the Committee highlighted that expulsions for offences against public order or morality are only in conformity with the Revised Charter if they constitute a penalty for a criminal act, imposed by a court or a judicial authority; they cannot be solely based on the existence of a criminal conviction. In addition, expulsions on such grounds must take into account all aspects of the non-nationals' behaviour, as well as the circumstances and the length of time of their presence in the territory of the State.⁵⁹ Crucially, the Committee reiterated a number of points that it had made in the context of conclusions on State reports submitted by the UK and the Netherlands.⁶⁰ First, where migrants are served with expulsion orders, they must have a right of appeal to a court or other independent body. Furthermore, the family members of a migrant worker should not be expelled as a consequence of his or her own expulsion, since these family members have an independent right to stay in the territory.⁶¹ The Committee determined that Italy had carried out collective expulsions of Roma and that the contested 'security measures' represent a discriminatory legal framework targeting Roma and Sinti.⁶²

The Committee's strict definition of the parameters within which expulsions of migrant workers are permissible is to be welcomed. That body's willingness to specify in depth what criteria states parties must meet when considering such expulsions has made clear the very limited scope that states are afforded under the Charter/Revised Charter in this context.

D. The Right to Participation

A final noteworthy element of the Committee's decision was its focus upon the question of civic participation. Consistent with the view that participation forms part of all economic and social rights,⁶³ the Committee asserted that 'civil and political participation'⁶⁴ on the part of Roma and Sinti not only requires strategies for empowerment from public authorities but also respect for ethnic identity and cultural choices. The Committee stated that Article 30 imposes a positive obligation on states 'to encourage citizen participation in order to overcome

⁵⁸ Ibid., para.139.

⁵⁹ Ibid., para. 151.

⁶⁰ Ibid paras 151-2.

⁶¹ Ibid., para. 152.

⁶² Ibid., para. 158.

⁶³ See, e.g. Committee on Economic Social and Cultural Rights (CESCR). General Comment No. 14 on the right to the highest attainable standard of health, E/C.12/2000/4 (2000), para. 11; CESCR, General Comment No. 15 on the right to water, E/C.12/2002/11 (2002), para. 14.

⁶⁴ *COHRE v Italy*, supra note 1, para. 106.

obstacles deriving from lack of representation of Roma and Sinti in the general culture, media or the different levels of government, so that these groups perceive that there are real incentives or opportunities for engagement to counter the lack of representation'.⁶⁵

Italy's failure to facilitate access to identification for Roma and Sinti resulted in the exclusion of potential voters. This, together with the limited opportunity for such persons to present their own interests with the authorities, resulted in a restriction of their possibility to participate in decision-making processes. In turn, this led to discriminatory treatment with regard to the right to vote and other forms of citizen participation for Roma and Sinti. The Committee identified this as, ultimately, a cause of marginalisation and social exclusion.⁶⁶

The implications of the Committee's identification of a right to civil and political participation under the Revised Charter are wide-ranging. Perhaps the most notable, however, is that move's confirmation of the indivisibility and interdependence of all civil, economic, political, cultural and social rights.

4. Toward a Hybrid 'International-European' Jurisprudence

Notably, in *COHRE v Italy* the Committee built upon its practice of referring to the jurisprudence of other judicial and quasi-judicial human rights bodies.

I have highlighted previously that, despite the close relationship and overlap between the rights protected under the two Charters and those set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Committee had until relatively recently made only very limited reference to the ICESCR and the statements of the UN Committee on Economic, Social and Cultural Rights in its collective complaints decision-making.⁶⁷ Indeed, it was only with two housing rights decisions in December 2007 that the Committee really moved towards increased reference to the ICESCR and the jurisprudence of the UN Committee on Economic, Social and Cultural Rights.⁶⁸

This can be contrasted with the Committee's deliberate, extensive reliance on the jurisprudence of the European Court of Human Rights in fleshing out the obligations imposed by the Charter.⁶⁹ In particular, the Committee's housing rights jurisprudence has been notable for its reference to Article 8 of the ECHR and the judicial statements of the European

⁶⁵ Ibid., para. 107.

⁶⁶ Ibid., para 109.

⁶⁷ Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9 *Human Rights Law Review* 225, 248. See, *ERRC v Greece*, supra note 3, at footnote 3 (where the Committee relied on information from the ComESCR's Concluding Observations on Greece's 2002 periodic report); *MFHR v Greece*, para. 196 (where, in clarifying its interpretation of the right to a health environment, the Committee also took account of the principles established in the jurisprudence of the ComESCR, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' rights); and Complaint No. 23/2003, *Syndicat occitan de l'éducation v France*, decision of 8 December 2004, para. 19 (quoting from complainants arguments).

⁶⁸ Complaint no. 33/2006, *International Movement ATD Fourth World v France*, 5 December 2007, para 70; and *FEANTSA v France*, supra note 3, paras 66-7.

⁶⁹ See, e.g., Complaint No. 13/2002, *Autisme-Europe v France*, 7 November 2003, para. 52 (fleshing out Article E of the Revised Charter in light of Article 14 ECHR). For more, see Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 *Human Rights Law Review* 61 at 72-4.

Court of Human Rights.⁷⁰ Indeed, *COHRE v Italy* saw the Committee continue to refer extensively to ECHR case-law, amongst other things adopting the European Court of Human Rights definition of ‘collective expulsion’⁷¹ and finding that, in parallel with Article 8 ECHR, Article 16 of the Revised Charter ‘protects a right to personal development and the right to establish and develop relationships with other human beings and the outside world’.⁷²

One notable element of the Committee’s decision in *COHRE v Italy*, is its employment of the margin of appreciation doctrine developed by the European Court of Human Rights. The Committee first incorporated the concept of the margin of appreciation into its collective complaints jurisprudence in its decision on the merits in *ERRC v Bulgaria*.⁷³ Here, explicitly citing European Court of Human Rights case-law, it stated that: ‘States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, in particular as regards to the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources’.⁷⁴ The Committee’s use of the concept appears to reflect a desire to adhere reasonably closely to the well-established approach of the Court. In *COHRE v Italy*, the margin of appreciation was raised in the context of data collection. Here the Committee highlighted that where such data ‘may appear necessary or appropriate for the achievement of the objectives of the Revised Charter ... this collection of detailed information must respect minimum international standards’.⁷⁵ The Committee stated that ‘if discretion must be left to the competent national authorities, the margin will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights ... Where a particularly important facet of an individual’s existence or identity is at stake, the discretion allowed to the State will be restricted’^[76].

In the same context, the Committee cited Article 7 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals, as well as jurisprudence of the European Court of Justice on the processing of personal data and on the free movement of such data.⁷⁷ The Committee thus clearly sought to link its decision and standards of rights protection with those of other European decision-making bodies.

Interestingly, while the Committee made reference to a range of UN human rights standards and treaty-monitoring body statements in the section of its decision on ‘international sources’, it did not seek to explicitly integrate these to any degree with its reasoning in relation to specific rights violations. This sits somewhat incongruously with the Committee’s

⁷⁰ In its first housing rights case, *ERRC v Greece*, supra note 3, the Committee stated ‘the implementation of Article 16 as regards nomadic groups ... implies that adequate stopping places be provided, in this respect Article 16 contains similar obligations to Article 8 of the European Convention of Human Rights’ (para 25). See more recently, the Committee’s statement in *FEANTSA v Slovenia*, supra note 3, that, ‘[t]he Committee is particularly concerned that its interpretation of Article 31 is fully in line with the European Court of Human Rights’ interpretation of the relevant provisions of the Convention’ (para 33).

⁷¹ *COHRE v Italy*, supra note 1, paras 155-6, citing *Conka v Belgium*, *Conka v Belgium* (2002) 34 EHRR 1298, paras 59 and 61.

⁷² *Ibid.*, para. 129, citing *P.G. and J.H. v United Kingdom*, application no. 44787/98, judgment of 25 Sept. 2001, para 56.

⁷³ Supra note 6. The Committee had, however, referred to the doctrine on several occasions in its conclusions on state reports.

⁷⁴ *Ibid.*, para 35.

⁷⁵ *COHRE v Italy*, supra note 1, para. 119.

⁷⁶ *Ibid.*, citing European Court of Human Rights, *Connors v. the United Kingdom*, 40 EHRR 189, para 82; *Evans v. the United Kingdom*, 43 EHRR 21, para 77.

⁷⁷ Case C-524/, *Huber v. Bundesrepublik Deutschland* [GC], judgment of 16 December 2008, paras 63-65.

previous statements that ‘the United Nations Covenant on Economic, Social and Cultural Rights is a key source of interpretation’ of Article 31 and that the Committee ‘attaches great importance to General Comments 4 and 7 of the UN Committee on Economic, Social and Cultural Rights’.⁷⁸ It is notable, however, that the Committee did employ language from its own previous decisions in which those documents were expressly cited. Furthermore, the approach adopted by the Committee towards the substantive content of the right to adequate housing is consistent with that of the Committee on Economic, Social and Cultural Rights in its work.⁷⁹

One area in which it would arguably have been desirable for the Committee to engage more expressly with the work of the Committee on Economic, Social and Cultural Rights (CESCR) was in the context of considering ‘retrogressive measures/steps’.⁸⁰ Ultimately, the Committee chose not to do so, preferring to simply acknowledge at several parts of its decision that the conditions and situation of Roma had ‘worsened’ since *ERRC v Italy*.⁸¹ This arguably amounted to a missed opportunity, given the likelihood that the current economic crisis and other factors renders it inevitable that that body will be called up on to consider retrogressive measures to an ever greater extent. That said, the lack of clarity surrounding the concept of retrogressive measures under international human rights law, including within the work of the CESCR, may well have led to reluctance on the part of the Committee to become entangled with it in any depth.⁸² It is notable that the Committee did state that ‘such realisation of the fundamental social rights recognised by the Revised Charter is guided by the *principle of progressiveness*, which is explicitly established in the Preamble and more specifically in the aims to facilitate the “economic and social progress” of State Parties and to secure to their populations “the social rights specified therein in order to improve their standard of living and their social well-being”’ (emphasis added).⁸³ This principle would appear to strongly resemble the notion of progressive realisation set out in Article 2(1) ICESCR (and hence could be understood to include a prohibition on retrogressive measures).⁸⁴ The Committee did not, however, make an express linkage between its jurisprudence and that of the Committee on Economic, Social and Cultural Rights in this context.

⁷⁸ See, e.g., *FEANTSA v France*, supra note 7, paras 66-7; *53/2008 FEANTSA v Slovenia*, supra n3, paras 36-7. *International Movement ATD Fourth World v France*, supra n70, paras 70-71. See also *INTERIGHTS v Greece*, supra n3, para 59.

⁷⁹ See, e.g., *COHRE v Italy*, supra note 1, para 54 where the Committee’s interpretation of ‘adequate housing’ is clearly modelled upon the definition of adequate housing set out by the CESCR in its General Comment No. 4 on The Right to Adequate Housing (Art. 11(1), E/1992/23 (1991)).

⁸⁰ For more on the CESCR’s approach to retrogressive measures, see its General Comment No.3, The Nature of States Parties Obligations, E/1991/23 annex III at 86 (1990).

⁸¹ See, e.g., *COHRE v Italy*, supra note 1, paras 58 and 77.

⁸² The Committee has thus far failed to engage in adequate depth with the notion of retrogressive measures, thereby resulting in the concept remaining somewhat elusive. For more, see Nolan, O’Connell and Dutschke, ‘Economic and Social Rights Obligations and Budgets: Making the Connection and Challenging an Imperfect Framework’, Working Paper. (Copy available from the author).

⁸³ The Committee also referred to its previous jurisprudence that ‘when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for other persons affected.’ (Complaint No. 13/2002, *Autisme-Europe v. France*, 4 November 2003, para 53).

⁸⁴ *COHRE v Italy*, supra note 1, para 27.

In sum, *COHRE v Italy* further confirms the Committee's move towards the development of a hybrid jurisprudence that incorporates elements of both international and European human rights law. Indeed, its reference to the work of the Inter-American Court suggests that the Committee is likely to prove ever more willing to link its work with that of other, non-European regional human rights systems in future.

5. Future Developments

Again, the urgency of the issues highlighted in the complaint was reflected by the Committee of Ministers' adoption of a resolution on an expedited basis on 21 October 2010.⁸⁵ In it, the Committee of Ministers stated that it

[t]akes note of the statement made by the respondent government and the information it has communicated on the follow-up to the decision of the European Committee of Social Rights and welcomes the authorities' commitment to ensure the effective implementation of the rights deriving from the revised European Social Charter for every individual, including for persons belong to the Roma communities.

The Committee of Ministers also stated that it looked forward to Italy reporting that, at the time of the submission of its next state report concerning the relevant provisions of the Revised Charter, the situation would be in full conformity with Italy's obligations under that treaty.

These weak recommendations on the part of the Committee of Ministers seem hardly likely to galvanise action on the part of the Italian state - particularly given Italy's failure to respond appropriately to the Committee's previous finding against it in the context of Roma rights.⁸⁶ Indeed, the Committee of Minister's most recent statement adds nothing substantive to the language of the Resolution that it adopted in response to the Committee's findings in *ERRC v Italy*.⁸⁷ This is despite the clear failure of Italy to address the violations determined by the Committee in that case and the Committee's finding of an aggravated violation.

Non-implementation of what is, in effect, a second stab at ensuring the protection of Roma housing rights in Italy through the Committee will be deeply problematic. This is true both in relation to the situation of Roma rights victims in Italy and in terms of the authority accorded to the decisions of the Committee. It has been noted that '[w]hilst the views of the Committee may not be binding on States, they provide an authoritative interpretation of treaty obligations which are, in themselves, binding.'⁸⁸ If the Committee's findings in relation to Charter rights are consistently ignored, then the utility of the mechanism other than as a largely symbolic standard-setting exercise will be limited.⁸⁹

⁸⁵ Resolution CM/ResChS(2010)8, 21 October 2010.

⁸⁶ The failure of the Committee of Ministers to make strong recommendations in response to the Committee's findings arguably has served to undermine the overall effectiveness of the collective complaints system. See Brillat, 'The Supervisory Machinery of ESC: Recent Developments and their Impact' in De Burca and De Witte (eds) *Social Rights in Europe* (Oxford: OUP, 2005) 31.

⁸⁷ Resolution ResChS(2006)4, 3 May 2006.

⁸⁸ Collective Complaint, 'INTERIGHTS against Greece', 28 March 2008, para. 9.

⁸⁹ In a publication predating the *INTERIGHTS v Greece* decision, Khaliq and Churchill note that 'the Committee's efforts risk becoming simply an academic exercise unless they are followed up by the Committee of Ministers ... addressing appropriate recommendations to States found by the Committee to be in non-compliance'. (Khaliq and Churchill, *supra* n2 at 452).

6. Conclusion

The novel elements of the decision in *COHRE v Italy* is likely to result in an increasing number of complaints being brought to the Committee. In terms of immediate advocacy impact, a complaint has just been lodged by COHRE against France, arguing that its recent expulsions of Roma constitute a violation of the Revised Charter.⁹⁰ This complaint shares several features with the COHRE's earlier application – both in terms of it constituting (in part, at least) a repeat complaint, and in alleging violations of a range of a number of the same provisions.⁹¹ It will, however, be the Committee's approach to COHRE's allegations that an intentional policy of forced eviction and mass expulsion of Roma in France violate a range of Charter rights that will be of greatest interest both to advocates, diplomats and other observers.⁹² This is particularly so in light of the growing momentum to expel Roma from a range of European countries.⁹³ Another reason for such interest is the recent decision of the European Commission to bring infringement proceedings against France for the expulsion of Roma, on the basis that that state has failed to transpose the 2004 EU Directive on freedom of movement into law.⁹⁴

It is to be hoped that *COHRE v Italy* will play a key role in ensuring the effective protection of the rights of Roma in Europe. However, whether this will be the case very much remains to be seen.

⁹⁰ COHRE, 'France: Complaint over Roma treatment lodged with European human rights body', Press Release, 16 November 2010: <http://www.cohre.org/news/press-releases/france-complaint-over-roma-treatment-lodged-with-european-human-rights-body> (accessed 16 Nov. 2010)

⁹¹ This complaint argues that the underlying issues regarding inadequacy of housing for Roma in France attest to violations of Article 31(1), Article 31(2), and Article 16, each individually and in conjunction with Article E. Acknowledging that violations were found in the earlier Committee decision of Complaint No. 51/2008 *ERRC v France*, decision on the merits of 19 Oct. 2009, the complainant urges that body to reaffirm 'these underlying violations' as they relate to the present complaint. (Collective Complaint, COHRE v France, 15 Nov. 2010, para 17). Available at: <http://www.cohre.org/news/press-releases/france-complaint-over-roma-treatment-lodged-with-european-human-rights-body> (accessed 16 Nov. 2010))

⁹² COHRE argues that such actions amount to breaches of Article 31 read alone and in conjunction with Article E of the Revised Charter, as well as violations of Article 19(8) read alone and in conjunction with Article E of the Revised Charter.

⁹³ See, e.g., European Roma Rights Centre, 'ERRC Challenges Danish Expulsion of EU Roma', Press Release 6 September 2006.

⁹⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EE.